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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 2.

JOHN FACTOR,
Petitioner,

v.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,
Respondents.

REPLY BRIEF OF PETITIONER ON REARGUMENT.

NEWTON D. BAKER,
RUSH C. BUTLER,
S. O. LEVINSON,
G. GALE GILBERT, JR.,
ALLAN J. CARTER,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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INDEX.

The Decisions of This Court on Local Criminality 4

The Dawes-Simon Treaty 6

Note 9

Appendix: Letter, Lord Aberdeen to Edward Everett, dated May 5, 1845..... 11

Cases Cited.

In re Cohen, 8 Ont. Law Rep. 143 (1904) 7

In re Rosen, Vol. 2, West. Weekly Rep. (Supreme Court of British Columbia, 1931), 799..... 7

Kelly v. Griffin, 241 U. S. 6 3

Pettit v. Walshe, 194 U. S. 205 ..... 4, 5

People v. Barnhill, 333 Ill. 150 3

People v. Ensor, 310 Ill. 483 3

Rex v. Coggins, 12 Cox Criminal Cases 517-521 3

U. S. ex rel. Klein v. Mulligan, 50 Fed. (2nd) 687 3

U. S. v. Rauscher, 119 U. S. 407 3

Wright v. Henkel, 190 U. S. 40 ..... 2, 4, 5

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REPLY BRIEF OF PETITIONER ON REARGUMENT.

The brief for respondents on reargument admits:

1. That the general principle affecting extradition requires local criminality in the country upon which the demand is made. (p. 24)

2. That the British Government has consistently maintained, with regard to all its extradition treaties with the United States, that surrender will only be made by Great Britain when the offense charged in the demand is made criminal by the laws of Great Britain. (This necessarily includes the local law of the British dominions and colonies.) (p. 31)

3. That the mass of diplomatic exchanges between the two governments "make much of the general principle or policy of nations not to grant extradition where the acts charged are not criminal according to their own laws." (p. 29)

4. That the offense charged is not made criminal by the laws of Illinois. (p. 14 and Appendix XXXVIII and XXXIX)

The brief for respondents suggests that the question of the need for local criminality is still at large in this Court, and seeks to explain the repeated holdings of this Court to the contrary as an unbroken series of inadvertences on the part of the Court occurring in every case the Court has decided from *Wright v. Henkel*, 190 U. S. 40, to its latest judgment.

Having refrained from claiming directly that criminality under the law of the State where the accused is found is not required, and having thus substantially conceded that it is necessary to establish the necessity of criminality by the law of Illinois as to the charge here made, it is suggested that the absence of any applicable law in the State of Illinois can be overcome by the alleged fact that, on the state of this record, it will be necessary for any British court which might try the petitioner, to find the petitioner guilty of the crime of obtaining by false pretences the property which he is charged with having received. Respondents' brief asserts that there is no other way by which the British court can prove knowledge, and that it would be a breach of faith on the part of the British authorities to attempt to prove the crime upon which surrender is demanded by any other process than by proving that the petitioner was guilty of obtaining by false pretences the property he was charged with having knowingly received.

The argument is that the record contains evidence of two offenses, both of which are criminal in England but only one of which, and that not the crime charged, is made criminal by the law of Illinois; and that, therefore, the petitioner should be surrendered because the British court, in the course of convicting him of the offense charged, must find that he committed an offense not charged, but an offense for which a demand might have been made under the law of Illinois. The difficulties of this suggestion are two: one, extradition takes place under the law everywhere

and always only for the offense charged, and not because either of alleged general wickedness or possible guilt of some offense not made the basis of the demand; two, the argument is a *felo de se*, for if the British court in such a case were to find that the petitioner had obtained by false pretences property which he is charged with having received, it would necessarily have to acquit him of the charge of receiving, since it is the law of Great Britain and the law of the United States that a man cannot be guilty of the crime of receiving that which he has previously obtained by false pretences or other criminal action. That this is the law both in England and America is shown in *Rex v. Coggins*, 12 Cox Criminal Cases 517-521; *People v. Barnhill*, 333 Ill. 150; *People v. Ensor*, 310 Ill. 483; *U. S. ex rel. Klein v. Mulligan*, 50 Fed. (2nd) 687; *Kelly v. Griffin*, 241 U. S. 6. The Commissioner is not authorized to construct, out of the evidence submitted, another offense than the one charged, particularly where such other offense would destroy the possibility of guilt as to the offense charged in the demand.

Not realizing this fatal objection to the suggestion made, the brief of counsel disposes rather too easily of another difficulty. To surrender the petitioner upon the demand here made on the ground that his trial will prove him guilty of an offense not charged, would result in his trial for another offense than that upon which his surrender was actually based. This is in direct conflict with the principle established by this Court in *U. S. v. Rauscher*, 119 U. S. 407. To overcome this difficulty, it is suggested that this Court in its decree, or the Secretary of State in his warrant of surrender, notify the British authorities that the United States will regard any trial of the petitioner as a breach of international good faith unless, in the course of that trial, the prosecuting authorities in Great Britain prove that the petitioner has committed an

offense for which he was not demanded or surrendered, the proof of which would require his acquittal of the crime for which his surrender was demanded and made.

THE DECISIONS OF THIS COURT ON LOCAL CRIMINALITY.

Counsel for the petitioner have analyzed the decisions of this Court fully in their principal brief on reargument and in the briefs on certiorari and original argument. In view of the fact that counsel for respondents argue that the decision in *Wright v. Henkel,* 190 U. S. 40, depended upon the fact that the crime there charged was required to be "made criminal by the laws of both countries" under the Convention of 1889, and that the language of the court in that case with regard to the general law was unnecessary to the decision, and that all subsequent holdings of this Court on that subject are inadvertences, we make this additional observation.

In the case of *Pettit v. Walshe,* 194 U. S. 205, the offense upon which extradition was demanded did not contain this special clause. In that case, this Court required the law of Indiana to be applied both in the definition of the offense and in the determination of any rules of evidence involved. (See especially the opinion of the court at page 217 where the absence of the clause is noted and the proviso of Article 10 of the Treaty of 1842 is held to have equivalent effect.)

The fact is that an examination of extradition cases in this Court, and the lower Federal courts, will show that persons demanded have sought habeas corpus on the ground that the test was either the existence of some general Federal law defining the crime, or a condition of preponderance among the States of the Union as to the definition of the

crime charged, rather than the definition by the law of the State where the accused was found. (See for example, briefs of counsel for demanding government in *Wright v. Henkel*, 190 U. S. 40, and *Pettit v. Walshe*, 194 U. S. 205.) Counsel for the British Government in these cases have insisted in their briefs filed in this Court that the test is the law of the State where the accused is found. This Court and the lower Federal courts have always denied the efforts of petitioners to escape from the definition of the law of the State in which they were found as applied to the offense charged in the demands. This Court sustained as the law of the United States the claim of the representatives of the British Government that the test is the law of the State. The contention that the law of the State where the accused is found is the test of local criminality has been urged by the representatives of the British Government on the basis of the language of the general proviso of Article 10 of the Treaty of 1842, and this Court has sustained that contention both where the crime charged did and where it did not have following it the expression "made criminal by the laws of both countries."

This consistent position on the part of both governments with reference to the language of the Treaty of 1842 and its supplementary conventions, extends the admission of counsel that the mass of diplomatic exchanges "evidently make much of the general principle or policy of nations not to grant extradition where the acts charged are not criminal according to their own laws" (Brief of respondents, p. 29) by showing that the attitude of both governments with regard to the Treaty of 1842 and its supplementary conventions has been that they conformed throughout with this general principle or policy and were express exemplifications of it.

THE DAWES-SIMON TREATY.

Counsel for the respondents argue at length for the view that the Dawes-Simon Treaty of 1932 came into effect in the United States upon the proclamation of the President. We urged this view upon the Court in our previous briefs. As to this point we respectfully request that the discussion contained in our earlier briefs, particularly the brief of petitioner on certiorari, pp. 46 *et seq.*, be considered.

Upon two questions raised by counsel for respondents, we add observations.

First, it is suggested that the Treaty of 1932 does not contain the language of the proviso of Article 10 of the Treaty of 1842. We respectfully submit that the language of Article 9 of the Treaty of 1932, though somewhat different in phrase, is identical in substance with the proviso of Article 10 of the Treaty of 1842. The language of Article 9 of the Treaty of 1932 is a paraphrase of Section 10 of the British Extradition Act of 1870 (see Appendix to our brief, p. 94) and would seem to have been adopted because of the settled construction of that act as requiring local criminality. The change in language is further justified by the fact that when that treaty came to be written, the British Government had for ninety years interpreted and acted upon the Treaty of 1842 as requiring local criminality in the State or Dominion where the accused was found, and the American Government, having the decision of this Court before it, recognized that the law of this country had been authoritatively declared to be the same as that of Great Britain. Article 9 of the Treaty of 1932 is, therefore, obviously a simple statement of an accepted, adjudicated and fundamental policy of both nations. It is inconceivable that any change in this policy could have been intended without language expressing the purpose, particularly when it is recalled that if any change were undertaken

by the high contracting parties in this regard, the application of any such change would have to be authorized by amendments to the extradition acts of the two countries and would, so far as Great Britain is concerned, deprive her dominions and colonies of a status as independent lawmakers in such matters at a time when the whole policy of Great Britain has been to accord to her dominions and colonies larger liberty and a greater degree of self-government.

The second point upon which we comment is the change in the language of the Treaty of 1932 covering the offense of "receiving." The new treaty does not contain the offense of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained" but does contain the offense of "receiving any money, valuable security, or other property, knowing the same to have been stolen or *unlawfully* obtained." (Italics ours)

Counsel for the respondents claim that the word "unlawfully" in the last clause of this statement is larger than, and includes the content of, the word "fraudulently" in the last clause of the section noted from the Convention of 1889.

We ask the Court to consider our argument upon this point in previous briefs, particularly in Petitioner's Brief on Certiorari, pp. 51 *et seq.*, and we call attention to the fact that the only two extradition cases in which a court has had occasion to determine the applicability of the rule of *ejusdem generis* are directly in point and against the contention of respondents. *In re Rosen,* Vol. 2, West. Weekly Rep. (Supreme Court of British Columbia, 1931), 799; *In re Cohen,* 8 Ont. Law Rep. 143 (1904). The conclusive consideration against any such so-called liberality of construction of the word "unlawfully" is that it would require extradition of the mere receiver while in many instances

the obtainer would not be subject to extradition, as there are many unlawful ways of obtaining property which are not enumerated in the Treaty of 1932 as substantive offenses subject to extradition, or included in any of the general designations therein contained.

It seems clear that the high contracting parties have withdrawn from the list of extraditable offenses the "receiving of property knowing the same to have been fraudulently obtained," and that since this offense is no longer extraditable and this Court must pass upon the petitioner's application in accordance with the state of the law as it now is, the petitioner must be discharged.

Respectfully submitted,

NEWTON D. BAKER,
RUSH C. BUTLER,
S. O. LEVINSON,
G. GALE GILBERT, JR.,
ALLAN J. CARTER,
Counsel for Petitioner.

NOTE

As an appendix hereto, we reprint a letter received at the State Department on the 5th of May, 1845, from Lord Aberdeen, the head of the British Foreign Office, which was not supplied us with the documents printed in the Appendix to our Brief on Reargument. The importance of this letter lies in the fact that Lord Aberdeen, at that early day, interpreted the Treaty of 1842 as not based upon any necessary identity or similarity between the laws of England and the laws of the United States but expressly recognized the imperfection of that similarity and contemplated acts which are treated as crimes in one country which are not always so held and treated in the other. This point was made in answer to Mr. Everett's contention, on instructions from Secretary Calhoun, and asserts the right of both countries to consider for themselves and according to their own laws whether their own local law justifies surrender.

Interesting discussions of the Treaty of 1842 in the Congress of the United States are to be found reported in the Congressional Globe, Volumes 12 to 15, inclusive. The origin of the extradition provisions in the Webster-Ashburton Treaty are given in the Appendix to Volume 15, beginning at page 524 and including the speeches of Senator Webster and Senator Woodbridge of Michigan. In general, the criticism of the Treaty arose from the fact that the Jay Treaty committed extradition to Executive discretion, while the Webster-Ashburton Treaty required, so far as Great Britain was concerned, that a demand for extradition should be passed upon by the courts, thus requiring judicial application of the laws of England to an alleged offense before extradition could be granted which, it was argued, was for the purpose of refusing extradition

in the case of fugitive slaves, since under the law of England, the status of slavery not existing, murder and robbery in an effort to escape would not constitute the crimes of murder or robbery when extradition was sought for either of these offenses.

See also the communication from Ashburton to Webster, dated August 9, 1842, (this document is to be found in the Appendix to our Brief on Reargument on page 7) notifying Mr. Webster that the new Treaty would not be in force in Great Britain until an Act of Parliament was secured providing for its enforcement, but that it would go into force at once in the Colonies and that the rest of the Treaty would be in force on ratification. See also speeches of Senator Benton, Volume 12, Appendix, pages 8, 12, and 22; Senator Conrad, Volume 12, page 58; the effect of this discussion being that prior to the ratification of the Treaty, the British position was pointed out and so far as we have been able to discover, no dissent from its correctness was expressed.

The discussion of this Treaty in the British Parliament is found in Hansard's "Parliamentary Debates," Volumes 66 to 71. See Lord Aberdeen, Volume 70, pages 472 and 479; The Attorney General, Volume 71, page 565; Lord Palmerston, Volume 71, page 572; Lord Stanley, Volume 71, pages 576, 578. The effect of the discussion in the English House of Lords was that fugitive slaves would not be surrendered under the Treaty since acts committed by them in an effort to escape involuntary servitude, which would otherwise constitute crimes, were justified by British law and would not be criminal in England.

APPENDIX

Letter, Lord Aberdeen to Edward Everett, dated May 5, 1845

Dispatch 330 Enclosure 1°.

Received 5 May 1845; copied into Book of British notes 6th

Edward Everett, Esq.

The Undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honour to acknowledge the receipt of the Note which Mr. Everett, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, addressed to him on the 30th of January last, relative to the case of John Kent, and to other points connected with the Extradition Convention between Great Britain and the United States.

The Undersigned does not deem it necessary to reply to all the Observations contained in Mr. Everett's Note with reference to the case of John Kent, because, as the case is closed, he does not perceive that any useful practical result could arise from entering into such discussion. But with regard to the intimation implied in the third clause of that Note, that the subordinate Authorities at Liverpool had not heartily seconded their Government in carrying the Provisions of the Convention into execution, the Undersigned must remark that he is unable to admit the justice of that supposition. On the contrary, considering the peculiarity and difficulty of the case, a case of an entirely novel description, the Magistrate appears to the Undersigned to have conscientiously done with respect to the American Authorities all that could be justly required or expected of him. And the Undersigned must still adhere to the opinion already expressed by him that the Magistrate could not, without a manifest violation of his Duties, and exposure to the personal consequences of that violation, have reconsigned to custody on board of an American Vessel, or elsewhere, a Person against whom no sufficient evidence of guilt had, in the opinion of the Magistrate, been adduced to justify his committal; in which opinion the Magistrate was confirmed by the actual acquittal of the Party by the Verdict of a Coroner's Jury.

In the case adduced by Mr. Everett of the delivery of a Seaman to the American Consul in 1841 by the same Magistrate, the Undersigned is unable to see any circumstance, as that case is represented by Mr. Everett, which renders it

parallel with that of John Kent. The Undersigned abstains therefore from all observation on that matter.

The Undersigned is equally compelled to dissent from the view taken by Mr. Everett of the design of the Convention, in reference to bringing to justice those guilty of certain crimes, namely, to consider the two Countries as in some respects belonging to one jurisdiction. The Undersigned conceives that the object and intent of the Convention between Great Britain and the United States, as in that between Great Britain and France, was simply to legalize and facilitate, so far as the Laws of each Country permitted, the mutual apprehension and delivery of Offenders, without reference to any theory of unity of jurisdiction, or to the similarity of Laws and Institutions as between one Country and the other. The affinity between the legal system of Great Britain and the United States must, in the apprehension of the Undersigned, be considered as a mere accident, and not as having had any part in inducing the conclusion of the Convention. That similarity is, in fact, in many points imperfect, and acts which are treated as crimes in the one Country are not always so held and treated in the other. (Italics ours.)

With respect to certain alterations in the Law for carrying out the Convention which Mr. Everett suggests as expedient, Her Majesty's Government have not failed to call to their aid the opinion of the Law Authorities in enabling them to decide on the propriety, or otherwise, of admitting those Alterations. The Undersigned is thus enabled to state to Mr. Everett that it is not considered advisable to introduce any clause into the Bill for making indictments found by a Grand Jury evidence of criminality, in cases of Extradition, sufficient of themselves without further evidence, to justify the apprehension of the Party charged. Were such evidence to be held sufficient of itself, there would be serious risk, in the difference which in some cases exists between the Laws of the two Countries, of depriving the Party charged of that safeguard and protection which was intended by the Treaty to be secured to him. It is not therefore considered that a larger power than that conveyed by the Act of Parliament ought to be vested in the Magistrate.

With respect to the other alteration proposed by Mr. Everett relative to the issuing of the Warrants, it is considered that it is absolutely necessary that two Warrants should be issued by the Secretary of State, the one for au-

thorizing the taking of the Party before the Magistrate, the other for taking him out of prison, should his committal be authorised by the Magistrate, and delivering him over to the Representative of the Foreign State.

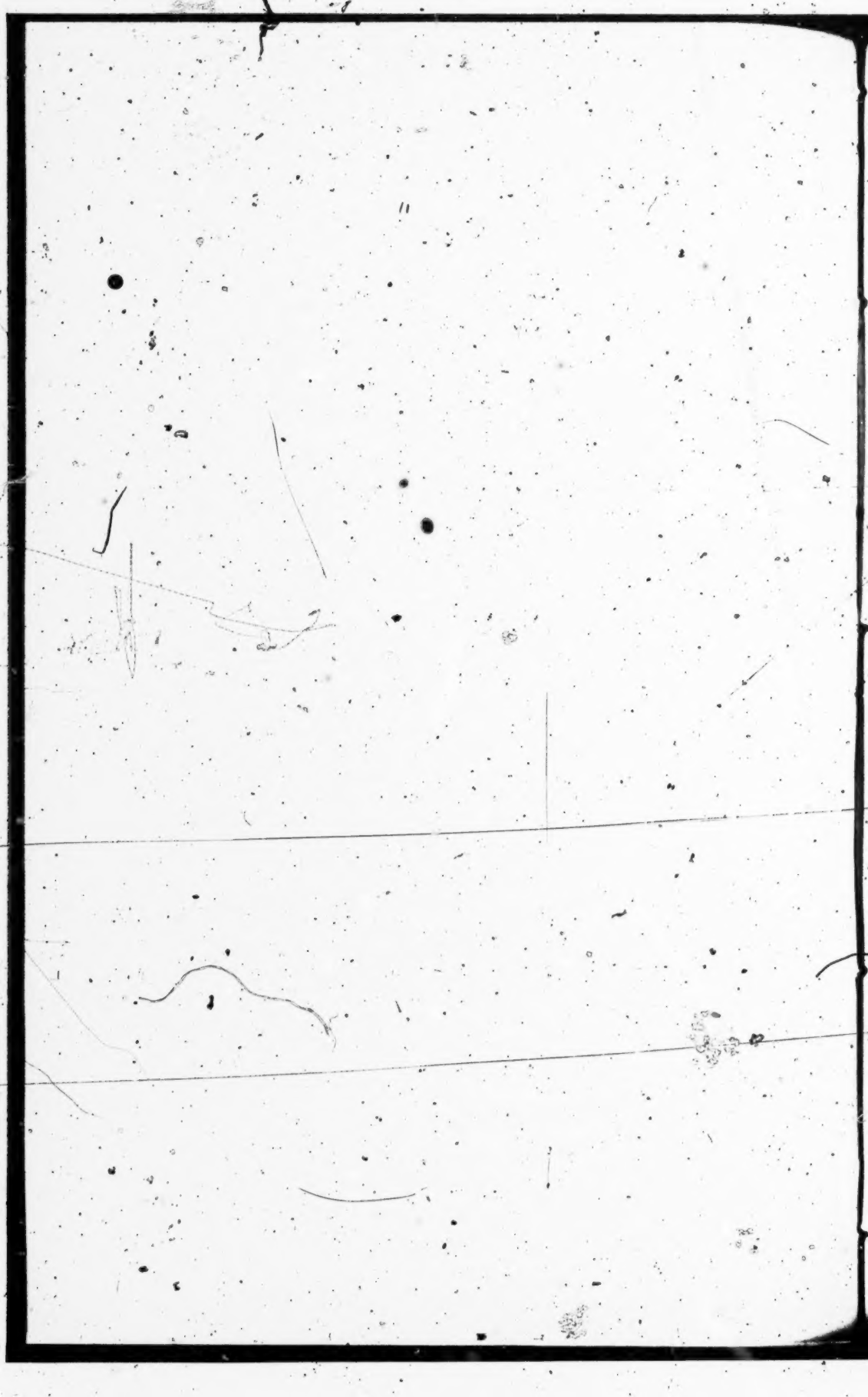
Under any circumstances it would be necessary that application should be made by the United States Representative to the competent British Authority, whether in Great Britain, or in the British Dependencies abroad, for the apprehension of an Offender under the Extradition Convention. The competent authority in Great Britain is one of the Secretaries of State, and from that Authority alone could properly issue an order for carrying the requisition into effect. But whether that order were issued in the shape of a Letter or of a Warrant, appears to the Undersigned to be of little moment, since in either case a certain space of time must be considered in the process. But not more time is required for issuing a warrant than for issuing a Letter. The Undersigned is unable therefore to perceive the precise advantage which would result from the suppression of one of the two Warrants, unless indeed it be meant that the requisition should be addressed directly from the United States' Representative to the Magistrate without the intervention of the Secretary of State. In that case the business would undoubtedly be transacted with greater rapidity; but that security for the correctness of the Transaction would be wanting which now exists, and with which Her Majesty's Government would not be content to dispense.

The Treaty undoubtedly mentions one Warrant only, namely, that for the surrender of the Party charged; but there is nothing in the Treaty which precludes either Party from adopting such a mode for effecting the apprehension of the Party charged, whether by means of a Warrant or otherwise, as it may think proper. The United States' Government may not hold such Warrant to be necessary, and may, if they think proper, dispense with it; but if the British Government deem a warrant requisite, they have full power, under the Treaty, to require its exhibition.

The Undersigned requests Mr. Everett to accept the assurance of his high consideration.

ABERDEEN.

Foreign Office
May 5, 1845.



SUBJECT INDEX.

PAGE

Brief in opposition to petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit 1

Statement of the Case 1

Argument 11

Summary of Argument:

I. Factor has been charged with a treaty crime and does not contend that the evidence fails to sustain the charge, hence no adequate reason is given why this Court should review the matter 11

(a) The complaint complies with the treaty, the Federal statutes and the authorities.. 11

(b) The receiving of money knowing it to have been fraudulently obtained is criminal under the laws of Illinois and the United States 15

(c) The Illinois Fraudulent Conveyance Act makes it criminal to receive money knowing it to have been obtained by false pretense 18

(d) The Broad Street Press and its agents acquired property in ways designated in England as "fraudulently obtained", but recognized in Illinois as forms of larceny and embezzlement, the consequence of which Factor was guilty under the Illinois statute of receiving stolen property.. 30

PAGE

(e) Under the criminal code of the United States any one receiving property knowing it to have been feloniously obtained is guilty 32

II. No adequate reason is presented why this Court should review the ruling of the Circuit Court that the Dawes-Simon Treaty, assuming it to be in effect, does not impair these proceedings 35

Appendix:

Opinion of Judge Knox in case of U. S. ex rel. Klein v. Mulligan 39

Opinion of Judge Dickinson in case of U. S. ex rel. Geen v. Fetters 48

Judgment of the Lord Chief Justice in the case of Rex v. Klein, Court of Criminal Appeal 58

TABLE OF CASES CITED.

Adutt, In re, 55 Fed. 376 13

Armstrong v. Bidwell, 124 Fed. 690 36

Arton, In re, 1 Q. B. 507 (1906) 15

Benson v. McMahon, 127 U. S. 457 ..... 15, 34

Bryant v. United States, 167 U. S. 104 13

Collins v. Loisel, 259 U. S. 309 ..... 15, 18

Dove, ex parte, 49 F. (2d) 816 36

Fernandez v. Phillips, 268 U. S. 311 13

PAGE

Great Northern Ry. Co. v. U. S., 155 Fed. 945 36
Greene, In re, 9 Can. Crim. Cas. 254 15
Greene, In re, 10 Can. Crim. Cas. 154 15
Grin v. Shine, 187 U. S. 181, 188 15

Kelly v. Griffin, 241 U. S. 6, 15 20
Kenton v. Pontalba, 40 La. Rep. 342 36
King v. Dix, 18 Times Law Rep. 231 15

McNamara v. Henkel, 226 U. S. 520 13
Merlo v. Coal Co., 258 Ill. 328 36

Nashimura Ekiu v. U. S., 142 U. S. 651 12

Ornelas v. Ruiz, 161 U. S. 502 (cited in Ferlinden v. Ames) 14
Oteiza v. Cortes, 136 U. S. 330 13

People v. Barnard, 327 Ill. 305 31
Powell v. United States, 206 Fed. 400 15

Queen v. Gov. of Prison at Halloway, 16 Times Law Rep. 247 15

Reg. v. Ganz, 46 Law Times Rep. 590 15

Shepard v. N. W. Life Ins. Co., 40 Fed. 341 36

Thomas, ex parte, 38 Dom. Law. Rep. 715 15

United States v. Greene, 146 Fed. 766 15
United States v. Greene, 154 Fed. 401 ..... 15, 32

Welander v. Hoyt, 176 N. W. 952 36

Yordi v. Nolti, 215 U. S. 227 12

PAGE

STATUTES.

Illinois Revised Statutes, 1931:

Chapter 38, Sec. 294 (Fraudulent conveyance) 18
Chapter 38, Sec. 239 (Receiving stolen property) .. 30
Chapter 38, Sec. 228 (False pretense) 30
Chapter 38, Sec. 389 (Larceny by agent or broker). 31
Chapter 38, Sec. 388 (Larceny by bailee) 31
Chapter 38, Sec. 287 (Blue Sky Law) 31
Chapter 38, Sec. 230 (Confidence game) 33

United States Statutes:

Section 651, Title 18, U. S. C. A. 12
Section 182, Title 18, U. S. C. A. 29
Section 104, Title 18, U. S. C. A. 29
Section 467, Title 18, U. S. C. A. (Receiving property feloniously obtained) 32
Section 339, Title 18, U. S. C. A. (Mail fraud) 33
Section 468, Title 18, U. S. C. A. (Adopting State penal code for Federal use) 33

TREATIES.

Dawes-Simon, Vol. 2, transcript 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 693

JOHN FACTOR,

Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

This extradition proceeding was instituted May 12, 1931, upon the application of Godfrey Haggard, British Consul General. United States Commissioner Edwin K. Walker issued a warrant for the fugitive who surrendered May 20, 1931. The British Consul's complaint (Vol. I; Trans. p. 12) charges in substance that Harry Wise, alias J. Factor, alias Guest, alias J. Walker, at London received